87-2100

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself
and all others similarly situated,

Plaintiff-Petitioner,

v.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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(a) Question Presented:

Whether a plaintiff who has obtained a determination of the United States Supreme Court (reversing all holdings of the New York State Courts) that installation of cable television equipment on private property under authority of State law constitutes a taking requiring just compensation (Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419), and who has won additional relief following remand, is entitled to an award of attorneys' fees and costs under 42 U.S.C. § 1988 against all opposing parties?

(b) Parties:

The parties are as set forth in the caption. Teleprompter Manhattan CATV Corp. and Teleprompter Corporation were merged into Group W Cable, Inc. resulting

in a change in title of the action in 1985.

The Attorney General intervened at the Court of Appeals level (first appeal) and filed a brief with this Court as amicus.

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(d) Prior Reported Opinions:

(i) Loretto v. Teleprompter Manhattan CATV Corp., 98 Misc. 2d 944, 415 N.Y.S.2d 180 (Sup. Ct. N.Y. Co. 1979), aff'd without op., 73 A.D.2d 849, 422 N.Y.S.2d 550 (1st Dep't 1979).

(ii) Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981).

(iii) Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

(iv) Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983), rearg. denied, 59 N.Y.2d 761, 463 N.Y.S.2d 1030 (1983).

(v) Loretto v. Group W. Cable, ___ A.D.2d ___, 522 N.Y.S.2d 543 (1st Dep't 1987).

(e) Jurisdiction:

(i) Review is sought of the Orders of the New York State Supreme Court, Appellate Division, First Department, entered December 15, 1987 (A-18) and February 10, 1987 (A-21). In the Order of

December 15, the Court granted reargument and adhered to its February 10 decision but its opinion (A-1) altered the basis of the decision.

(ii) An order of the New York State Court of Appeals denying Plaintiff's motion for leave to appeal to that Court was entered March 24, 1988. (A-84).

(iii) This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1257 as review is sought of the final judgment or decree of the highest State Court in which a decision could be had where a title, right or privilege was specially set up or claimed under 42 U.S.C. § 1988. The Appellate Division is the highest State Court in which a decision could be had as

the Court of Appeals declined to review. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678 n.1, 88 S.Ct. 1298, 1300 n.1, 20 L.Ed.2d 225, 228 n.1 (1968).

(f) Statute Involved:

42 U.S.C. § 1988 reads (in relevant part):

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(g) Statement of Case:

Plaintiff commenced this action in 1976 to obtain for herself and other New York State property owners a determination of entitlement to just compensation for the property taking occurring

when cable television companies, acting under authority of New York's Executive Law § 828(i)(b), install cable and related equipment on private property without the owner's consent. Section 828 generally authorizes such installations; subsection (i)(b) prohibits landlords from demanding or accepting any compensation with respect to such installations "in excess of any amount which the commission [on cable television] shall, by regulation, determine to be reasonable." The New York Court of Appeals definitively interpreted this provision as granting the Commission the right to award or withhold compensation in its unfettered discretion. The Court of Appeals also held that no taking had occurred under Section 828 as that statute did no more than reasonably restrict property rights under the police power. Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d

124, 137-138, 151, 440 N.Y.S.2d 843, 848-849, 857 (1981).

On appeal this Court reversed, holding that Teleprompter's conduct constituted a taking for which just compensation is required under the taking clause of the Fifth Amendment incorporated by the Fourteenth Amendment. (458 U.S. 419). This Court remanded to the New York Court of Appeals to consider "[t]he issue of the amount of compensation that is due." (458 U.S. at 441).

This Court's decision was seminal in that it confirmed, for the first time after many decades of analyzing property rights cases purely in terms of balancing competing interests, that a continuing physical occupation of private property, no matter how slight, constitutes a taking on a per se basis. The decision is frequently cited and has been relied upon by this Court in its

subsequent cases supporting private property rights. See, e.g., Nollan v. California State Coastal Comm'n, 483 U.S. ____, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); First Evangelical Church v. County of Los Angeles, 482 U.S. ____, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); Hodel v. Irving, 481 U.S. ___, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (Stevens, J., concurring); United States v. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982).

On remand, the Court of Appeals determined that compensation should be set in the first instance by the New York State Commission on Cable Television, subject to judicial review. The Court also declared invalid as a deprivation of due process the Commission's regulation establishing a 60 day statute of limitations for owner applications for compensation, but omitting any provision for

notice to the owner. Because the statute of limitations was invalidated, the previously terminated rights of thousands of owners to obtain compensation were restored. In addition, the Court of Appeals substantially broadened the class of owners who could recover compensation through the Commission by reinterpreting the scope of the statute and regulations to cover non-rental as well as rental properties and to cover cross-over installations (those crossing over the properties on which they are installed to service other properties) as well as pure non-crossover installations (those servicing only the property on which they are installed). (58 N.Y.2d 143, 459 N.Y.S.2d 743). Having ruled that compensation should be set by the Commission, the Court of Appeals affirmed the original dismissal of the complaint except to reserve review jurisdiction and authority

of the lower court to award trespass damages as to a ten-month period prior to the effective date of Section 828.

As a result, the State Commission adopted a new statute of limitations running from the date on which the cable company gives formal notice to the owner of his rights (or the date of installation if notice is given earlier) (9 NYCRR § 598.5), as well as numerous other changes to conform to the rulings of this Court and the Court of Appeals. Since Group W has evidently made a practice of not giving notice to owners except in the few instances where the company has made new installations, the statute of limitations has not even begun to run in most cases. (Appellant's Reply Br. in App. Div. p. 13).*

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* The Commission has recently (on April 11 and 14, 1988) decided five owner compensation cases. In two cases, it

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Because all class action and Civil Rights Act aspects of the complaint had been dismissed, the only recourse available to Plaintiff and others was through the Commission. Counsel for Plaintiff concluded that an effective presentation to the Commission, including expert testimony, would be extremely

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[fn continued from preceding page] awarded $150 and $400 -- amounts approximating the amounts Plaintiff had sought for individual owners. In two others, the Commission denied the non-monetary relief which had been requested but allowed time for a reapplication for a monetary award above $1. In all five cases, the Commission granted $1 for the basic taking. However, it explained the two additional larger awards as being for a "temporary excessive taking" consisting of the occupancy of more physical space than was actually required for the installation. The Commission offered no explanation for its somewhat unusual view that space necessary for an installation is worth less than space which is not necessary for the installation and that compensation for permanent use should be less than that for temporary use.

These awards came after all action of the New York Courts. It is clear that the awards would not have affected the Appellate Division's holding since that

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expensive and could probably not be pursued on a class basis within the administrative agency. Counsel therefore determined to seek compensation for their services to date (time-charges and disbursements to that point having come to some $466,000) before proceeding further.

An application for counsel fees was made to Special Term of the Supreme Court, New York County, in early 1985. Special Term determined that Plaintiff was entitled to counsel fees under both 42 U.S.C. § 1988 and New York's class action statute, but declined to make any award at the time on the ground that, in

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[fn continued from preceding page] Court's rationale was that Plaintiff can never "prevail" unless she herself first unsuccessfully applies to the Commission. The successful applications of others would merely reinforce the Appellate Division's belief that the statute provides a sufficient remedy for obtaining just compensation and, therefore, Plaintiff has not been deprived of any constitutional right. (See pages 27-33 below).

the absence of any compensation award by the Commission, the fee application was "premature" and/or required prior exhaustion of administrative remedies.* (A-24 ff; A-45 ff).

The Appellate Division affirmed, but, ultimately, on entirely different grounds. Initially, the Appellate Division affirmed without opinion. (A-21). On reargument, evidently influenced by Group W's urging that "plaintiff will have a very large incentive to pursue these proceedings at no cost to herself if her attorneys believe that further prosecution of this case will permit them to recover an attorneys' fee in excess of $500,000"** -- i.e., that fees

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* The administrative remedies referred to by Special Term were for owner compensation. No one has asserted that any administrative agency has authority to award attorneys' fees in this matter.

** Group W's Memorandum to the
[fn continued on next page]

should be denied so that Plaintiff would be financially unable to pursue administrative proceedings to obtain compensation and this Court's directive to provide owner compensation would effectively be defeated -- the Appellate Division issued an opinion absolutely denying fees on the sole ground that Plaintiff had not "prevailed." (A-1).

The Appellate Division's thesis was that, in order to prevail on a taking claim, a plaintiff must show both that there was a taking and that the plaintiff had been denied compensation. The Appellate Division acknowledged that this Court had found a taking, but asserted that Plaintiff had never been denied compensation as she had not applied for compensation after this Court had found

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[fn continued from preceding page] Appellate Division in Support of Group W's Cross-Motion for Leave to Appeal, p. 6.

her entitled to it. In fact, Plaintiff had already been denied compensation because the New York Court of Appeals had expressly ruled that no compensation was required either constitutionally or by statute. Thus, when Plaintiff obtained reversal by this Court, she clearly established both that there had been a taking and that she had been denied compensation.

Motions to the Appellate Division and the Court of Appeals for leave to appeal to the Court of Appeals were denied. This petition follows.

Plaintiff contends that she has prevailed, as contemplated by 42 U.S.C. § 1988, by virtue of her victory in this Court and the favorable changes in law and procedure subsequently achieved in the Court of Appeals and the Commission. The action of the New York Courts in removing the controversy from the courts

into an administrative agency, where fee reallocation is not feasible, then denying fees in this case on the rationale that Plaintiff has personally not pursued an administrative remedy hitherto unavailable, cannot fail to deter the prosecution of Civil Rights Act actions in New York.

(h) Raising of Questions Below:

The question presented here was the primary issue raised at each step of the proceeding below. The Federal Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988) was appropriately invoked at each stage.

At Special Term, Plaintiff's application for fees rested largely on 42 U.S.C. § 1988 (it rested additionally on the State class action statute). The Special Term Judge recognized that

Plaintiff had satisfied the requirements of Section 1988. (A-24; A-32-A-39).

The Appellate Division also focused closely on that section. (A-9-A-13).

Plaintiff's motion for permission to appeal to the Court of Appeals also clearly raised the issue. (A-85).

(i) Argument:

Plaintiff Is Entitled to Fees.

There are three basic reasons for review of the decision below: First there is the chilling effect of state courts effectively evading a directive of this Court to award taking compensation by mandating an expensive application procedure, and then denying an award of fees to the party who obtained the catalyzing Supreme Court ruling so that funds for pursuing the application and establishing an effective compensation

precedent are unavailable. Secondly, the case offers a vehicle for more precise definition of two important concepts: (i) what constitutes a Section 1983 cause of action and (ii) what constitutes "prevailing" on it so as to be entitled to fees under Section 1988. Thirdly, the case presents the issue of whether Plaintiff is entitled to an interim award of fees in a protracted litigation once she has achieved success, even if the success is deemed to be only at an interim stage.

(A)

In Civil Rights Act actions, the recovery of attorneys' fees by the prevailing party is allowed as a matter of course in order to encourage private parties to vindicate constitutional rights. Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76

L.Ed.2d 40, 48 (1983). As Congress stated in enacting 42 U.S.C. § 1988,

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. (S. Rep. No. 94-1011 p. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910).

The effect of the decision below is precisely the opposite of that sought by Congress.

The decision of the Appellate Division tells counsel here -- and the bar in general -- that after some 11 years of work and the establishment of a major constitutional principle by decision of the United States Supreme Court, counsel cannot recover one penny of fees without commencing an entirely separate administrative proceeding (in which Respondents may quite possibly not be

liable for attorneys' fees)* and prosecuting that at whatever cost, and over however many years, and through however many appeals, it may require.**

The Appellate Division's decision must inevitably chill any

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* The availability of attorneys' fees in administrative proceedings ancillary to judicial actions in which fees are available has been the subject of relatively few decisions with diverging results. Cf. Webb v. Board of Education, 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985) (denying fees for work on optional administrative proceeding preceding court action), and Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. ___, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (awarding fees for administrative enforcement efforts following court proceedings).

** The Commission itself functions at a snail's pace. It took over three years after the effective date of Executive Law § 828 for the Commission to adopt its Statement of General Policy incorporating its one dollar one-time payment notion of "fair" compensation. It then took 1 1/4 years after the Court of Appeals referred the issue of compensation to the Commission (58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983)), for the Commission to promulgate regulations governing the procedure for making such applications, including

[fn continued on next page]

inclination to utilize the courts of the State of New York for the vindication of constitutional rights on behalf of the disadvantaged. Where the prospective economic benefit to any individual plaintiff is small, it becomes unthinkable to contemplate expending the time and money required for a round trip (or two) to the United States Supreme Court. As the Fifth Circuit said in another case which took 11 years for liability to be established, leaving the remedy still to be determined,

> There is a danger that litigants will be discouraged from bringing

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[fn continued from preceding page] complying with the Court of Appeals' mandate to revise the invalid 60 day statute of limitations. Only in April 1988 did the Commission finally render its first five post-Loretto decisions on landlord compensation, some five years after the Court of Appeals directed the Commission to make initial compensation decisions (58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983)). The Commission's written decisions were issued as much as ten months after its minutes reflect that it had ruled on the cases.

> such suits because of the risks of protracted litigation and the extended financial drain represented by such a risk. (James v. Stockham Valves and Fittings Co., 559 F.2d 310, 358 (5th Cir. 1977)).

In the end, with their decisions in this case, the New York courts have effectively frustrated the ability of property owners to obtain the compensation this Court said was their due, and have strongly inhibited the prosecution of Civil Rights Act claims in that State.

(B)

This Court has recently suggested that "[w]hatever the outer boundaries of [the] term ['prevailing party'] may be" presents an open question. Hewitt v. Helms, 482 U.S. ___, 107 S.Ct. 2672, 2675, 96 L.Ed.2d 654, 661 (1987).

We do not suggest that this is an "outer boundaries" case. It is, however, a case in which this Court can

provide immeasurably useful guidance to New York and other courts concerning what constitutes a Section 1983 cause of action and at what point a Civil Rights Act plaintiff "prevails."

(i)

The key issue here is the Appellate Division's misapplication of Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (holding that a Civil Rights Act cause of action for a taking requires a showing of both a taking and a denial of just compensation), and its blatant textual revision of the Court of Appeals' ruling on remand so as to deprive Plaintiff's counsel of compensation. The essence of the Appellate Division's holding is that Plaintiff never stated a Section 1983 cause of action for a taking because she

satisfied only one part of Williamson's two-pronged test: she established that there was a taking, but not that she had been denied compensation. The Appellate Division reasoned that, because the Court of Appeals reinterpreted Section 828 after this Court's ruling as providing an adequate procedure for obtaining compensation, the procedure had been available all along and Plaintiff cannot have been denied compensation until she unsuccessfully seeks it from the Commission.

The resulting denial of counsel fees was achieved through post hoc interpretative legerdemain. The Appellate Division suggests that Section 828 always provided a remedy for securing just compensation since this Court "specifically left open whether § 828 provided plaintiff a sufficient avenue to obtain compensatory relief" (A-7), and the Court of Appeals, on remand, concluded that it

did. In fact, however, the Court of Appeals, in its first decision, conclusively held that Section 828 did not require that compensation be paid at all and the legislature did not intend any such requirement. And there can be no doubt that this Court did not remotely suggest that it was second-guessing the Court of Appeals' interpretation of the New York statute.

The reasoning of the Court of Appeals demonstrates that Plaintiff clearly had no administrative or judicial remedy for obtaining just compensation prior to this Court's decision. Therefore, when she was denied compensation by the New York Courts, she had satisfied the second part of the Williamson test. The Court of Appeals held that Plaintiff did not have to exhaust administrative remedies before bringing this action (by applying to the Commission for just

compensation) because Section 828 was enacted purely under the police power -- not under the eminent domain power:

> The fact that section 828 (subd 1, par b) of the Executive Law . . . imposes an upper limit upon the amount that may be demanded or accepted by a landlord from a cable television company rather than a requirement that such a company pay compensation to a landowner . . . leads us to conclude that the Legislature in enacting article 28 of the Executive Law, in which section 828 is contained, intended to act under the police power only . . . . (53 N.Y.2d at 138, 440 N.Y.S.2d at 849).

Thus, Plaintiff did not have an administrative remedy for securing eminent domain compensation when she brought suit.

Later in the opinion, the Court of Appeals made the following observation:

> That, as stated in [the quotation] above the Legislature imposed no requirement for compensation makes unnecessary our consideration of many of the eminent domain arguments advanced by plaintiff. (53 N.Y.2d at 143, 440 N.Y.S.2d at 852).

This Court did not, anywhere in its opinion, suggest that the Court of Appeals had left the question of Section 828's meaning open. It said simply that

> The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand. (458 U.S. at 441).

On remand, the Court of Appeals definitively confirmed that it was now reinterpreting Section 828(1)(b). After reciting that this Court had held that "the character of the governmental action involved in section 828 is a taking," the Court of Appeals declared "the section is to be construed so as to sustain its constitutionality in light of that holding if possible . . . ." The Court went on,

> So much of our prior decision as reasoned that the Legislature intended to act under the police power only and not to require the payment of compensation having

> been invalidated by the Supreme Court's holding, the question becomes whether the language of the statute admits of a construction which provides a method of compensation for crossover and noncrossover situations. We conclude that it does. (58 N.Y.2d at 149, 459 N.Y.S.2d at 747; A-58; emphasis in original).

Thus, the Court of Appeals acknowledged that its earlier interpretation of Section 828 did not afford a remedy for taking compensation and that it was reversing its interpretation to provide such a remedy.

In this case, fees were denied simply because an administrative remedy has since been created where none previously existed. This denial of fees cannot be said to be merely the wages of failure which any Civil Rights attorney takes the risk of. Up until the remand to the Court of Appeals, there was a law, confirmed by the Court of Appeals' initial decision on the merits, that no

taking had occurred and there was no right of just compensation and, therefore, no administrative remedy by which a property owner could obtain just compensation. Had the United States Supreme Court's reversal been followed up by a legislative amendment to Section 828 creating a new administrative remedy by which just compensation could be obtained, no one would doubt that Plaintiff had catalyzed that result and would be entitled to attorneys' fees for having done so. See, e.g., Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981). It is logically unfathomable that the result should be any different because the subsequent amendment was accomplished judicially rather than legislatively.

(ii)

After it is determined that Plaintiff has stated a Section 1983 cause

of action, the question of whether she has "prevailed" still remains. This Court has decided relatively few cases on this subject. Most recently, it determined in Hewitt v. Helms, 482 U.S. ___, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), that an interlocutory success in maintaining the validity of a cause of action does not suffice if the cause of action is still subject to dismissal upon trial or later motion.

In Hewitt, the Court cited Hanrahan v. Hampton, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670, 674, reh'g denied, 448 U.S. 913, 101 S.Ct. 33, 65 L.Ed.2d 1177 (1980), for the proposition that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." (107 S.Ct. at 2675, 96 L.Ed.2d at 661). Whether "some relief on the

merits" means a choate remedy (e.g., an actual award of damages) or, as in this case, a major victory on the question of liability ("entitlement to some relief on the merits" in the actual words of Hanrahan v. Hampton, 446 U.S. at 757 (emphasis added)), is a matter of interpretation. The view that liability (rather than actual relief) suffices receives support from Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) (fees in a derivative and class action should be awarded when the plaintiff prevails on the liability issue even though damages may never be awarded), and Bradley v. Richmond School Board, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) (fees are awardable in Civil Rights Act litigation when liability is established even though damages have not yet been fixed). Cf. Hensley v. Eckerhart, 461 U.S. 424,

433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983) (defining a "prevailing party" as one who has "'succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit'").

Cases in lower courts also vary widely. For example, Group W cited New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718 (2d Cir. 1984), below, denying fees where the applicant won only one minor modification in the city agency regulations, and was denied all other relief. Cases at the other end of the spectrum include Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986) (attorneys' fees should be awarded upon winning a reversal on a point of law even though, on remand, the plaintiff may fail to prove liability or entitlement to damages); Fast v. School District of City of Ladue, 728 F.2d 1030

(8th Cir. 1984) (en banc) (plaintiff entitled to fees where she won the right to a written statement of school board's reasons for lay-off and the opportunity for post lay-off hearing, but chose not to pursue the matter further); and Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979) (unlawful employment termination action dismissed as moot but attorneys' fees award sustained on ground that plaintiff had, by the litigation, secured her right to a hearing even though the hearing resulted in termination of her employment).

The question of what constitutes "prevailing" is obviously one of substantial public importance which requires clarification of both its "outer boundaries" (Hewitt v. Helms) and inner core. This case provides an appropriate vehicle.

(C)

On a third level, one may ask whether Plaintiff, who has completed the full judicial cycle and obtained all relief available through the courts, should be required to go through a separate administrative proceeding to fix compensation before her application for attorneys' fees may be considered ripe. If one views each step as discrete, then, quite obviously, Plaintiff has already prevailed to the maximum possible extent. If one views both steps together as parts of a total process, then the question becomes whether Plaintiff is entitled to an interim award upon achieving victory on major elements of the claim even though the amount of compensation remains to be determined.

The Appellate Division rejected the concept of an interim award. That

rejection violates the teaching of the major authorities on the issue. This Court has declared in Bradley v. Richmond School Board, 416 U.S. 696, 723, 94 S.Ct. 2006, 2022, 40 L.Ed.2d 476, 495 (1974), that "[t]o delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel . . .." Fees are, therefore, awardable on an interim basis when the plaintiff has achieved substantial success on the merits, such as by establishing liability, even though damages are left to be fixed and may be minimal or non-existent. Bradley, supra; Mills v. Electric Auto-Lite Co., supra. Cf. Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670, reh'g denied, 448 U.S. 913, 101 S.Ct. 33, 65 L.Ed.2d 1176 (1980) (reversing an interim award of fees on the ground that the plaintiff had not yet established liability).

Here, Plaintiff has won the basic constitutional principle -- that a taking has occurred requiring the payment of just compensation -- and has won certain substantive relief absolutely, for example, the enlargement of the statute of limitations restoring the rights of some 16,000 class members to pursue claims. There remains, however, the highly theoretical and remote possibility that the Commission would award only nominal compensation and that the courts would sustain such an award.* But that possibility is irrelevant: appellate courts have rather consistently sustained very large attorneys' fee awards on small or non-existent damages awards so that, even if Plaintiff ultimately recovers little compensation, counsel would still

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* Again, the Commission has, in fact, made significant monetary awards. See footnote, pages 14-16, supra.

be entitled to substantial fees.* See, e.g., City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) ($245,456.25 in fees on a judgment of $33,350):

> Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. (477 U.S. at 574).
>
> * * * *
>
> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. (477 U.S. at 578).

See also DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985) ($27,832.82 fees;

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* If one were to conclude that a minimal compensation award would diminish the amount of fees to which Plaintiff's counsel would be entitled, it would be far more appropriate to grant an interim fee award reflecting the minimum amount to which counsel would be entitled (subject to later upward adjustment) than to deny fees altogether.

$2,250 damages); Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1980), on remand, 519 F. Supp. 309 (N.D. Ill. 1981) ($6,086.12 fees; $1 nominal damages); Nephew v. City of Aurora, 830 F.2d 1547 (10th Cir. 1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 1269, 99 L.Ed.2d 481 (1988) ($12,500 fees; $1 nominal damages); Dean v. Civiletti, 670 F.2d 99 (8th Cir. 1982) (reasonable fees required; $1 nominal damages); Spano v. Simendinger, 613 F. Supp. 124 (S.D.N.Y. 1985) ($62,078.21 fees; $2,250 damages).

The question of the parameters of the Hewitt v. Helms decision again comes into play. To the extent that it suggests that the plaintiff must personally realize some substantial direct benefit from the litigation in order to be entitled to fees, does it qualify the right to interim awards authorized by this Court in Bradley v. Richmond School

Board and Mills v. Electric Auto-Lite Co.? This is surely a question of profound public interest on which further explication from this Court would be most desirable.

CONCLUSION

The petition for certiorari should be granted and the case scheduled for argument.

Respectfully submitted,

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APPENDIX

APPENDIX

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[Supreme Court, Appellate Division, First Department]

Murphy, P.J., Sandler, Milonas, Rosenberger, Smith, JJ.

M-1120
M-1491

Loretto v. Group W. Cable

M-1526
M-1546

The motion of plaintiff Jean Loretto for reargument or for leave to appeal is denied in its entirety, without costs.

The cross-motions of defendants Group W. Cable, Inc. and the City of New York and of intervenor State of New York for leave to appeal are granted to the extent of deeming their motions as ones for reargument which we grant, and upon reargument we adhere to our affirmance of the appealed order which denied plaintiff's motion for attorneys' fees, but do so for the reasons stated hereinafter, without costs.

Reargument is granted in this matter to clarify the basis of our affirmance

of the appealed order denying as "premature" plaintiff's motion to recover attorneys' fees. The order had been affirmed without opinion.

In passing upon the motion, Special term held that the plaintiff "must be deemed a prevailing party" within the meaning of 42 USC § 1988 and that as a prevailing party, plaintiff might eventually be entitled to an award of attorneys' fees to be assessed against defendants and the intervenor. Plaintiff's motion for a fee award was denied only because, in the court's view, the impact of plaintiff's lawsuit could not yet be evaluated. In view of its ruling that attorneys' fees would eventually be proper under 42 USC § 1988, the court found it unnecessary to reach the question of whether attorneys' fees might also be awarded pursuant to CPLR 909.

The court did, however, suggest that although no notice to the class certified in this action was ever given, the class action might nevertheless remain viable and that attorneys' fees pursuant to CPLR 909 might eventually be awarded out of whatever judgment fund resulted after proceedings before the State Commission on Cable Television had run their course.

Although we think that Special Term correctly denied the motion for attorneys' fees, we think that the reasoning leading to the determination was erroneous in several respects, and unless clarified will lead to future confusion. Accordingly, we adhere to our initial affirmance but for the reasons which follow.

This action, initially seeking recovery primarily for trespass, was com-

menced by the plaintiff in 1976. Plaintiff alleged that she had sustained some $1 million in damages as a result of defendant cable television company's installation upon the roof of her premises certain equipment necessary to provide cable TV service to one of her tenants and to tenants in adjoining buildings. She also alleged that defendant's use of her premises for its equipment, purportedly authorized by section 828 of the Executive Law, constituted a taking of her property without just compensation, and that she had been deprived of her property without due process of law. Initially, plaintiff's complaint was dismissed by Special Term which held on summary judgment that defendant's installation of its cable facilities on petitioner's building was indeed authorized by Executive

Law § 828[1] and that such law was a valid exercise of the state's police power.

---

1 Executive law § 828 provides in relevant part:

> No landlord shall
>
> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
>
> i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;
>
> ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and
>
> iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.
>
> b. demand or accept payment from any tenant, in any form, in exchange for permitting

(Footnote 1 continued on next page)

This Court affirmed as did the Court of Appeals which, in essence, held that Executive Law § 828 did not authorize such interference with petitioner's property rights as would amount to a taking. (Loretto v. Teleprompter CATV, 53 NY2d 124, 151). The United States Supreme Court reversed upon the "the very narrow holding" that the "otherwise valid regulation so frustrates property rights that compensation must be paid." (Loretto v. Teleprompter CATV, 458 U.S. 419, 425-426, 441). On remand, the Court of Appeals, noting that the Supreme

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(Footnote 1 continued from previous page)
cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, be regulation, determine to be reasonable.

Court had not questioned the validity of Executive Law § 828 as an exercise of the state's police power, and that the Court had specifically left open whether § 828 provided plaintiff a sufficient avenue to obtain compensatory relief, went on to hold that § 828 did in fact provide a means for plaintiff to obtain just compensation as it permitted plaintiff to submit a claim for reasonable compensation to the State Commission on Cable Television. (See Executive Law § 828[1][b]). The Court of Appeals although leaving intact the dismissal of the original complaint retained jurisdiction over the matter to review whether the compensation fixed by the Commission constituted just compensation within the meaning of the Constitution (Loretto v. Teleprompter CATV, 58 NY2d 143).

Neither plaintiff nor any other landlord in the putative class certified in this action has, since the Court of Appeals' February, 1983 remand decision, made application to the Cable Commission for reasonable (now referred to in the Commission regulations as "just") compensation. Instead, plaintiff in December, 1984 filed the present motion to recover more than half a million dollars in attorney's fees from the defendants and the intervenor. Plaintiff sought this recovery on the ground that she was the prevailing party in a civil rights action and so was entitled to attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988. 42 USC § 1988 provides:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1966 [sic] of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the pre-

> vailing party other than the United States, a reasonable attorney's fee as part of the costs" (emphasis added).

Plaintiff also sought to recover attorneys' fees pursuant to CPLR 909 which provides:

> R 909. Attorneys' fees.
>
> If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class.

To state a claim as a "prevailing party" for attorneys' fees under 42 USC § 1988 plaintiff who relies upon 42 USC § 1983 must first demonstrate that she has been deprived of a federal right under color of state law (42 USC § 1983; Gomez v. Toledo, 446 US 635, 640 [1980]); Annunziato v. The Gan, Inc.,

744 F.2d 244, 250 [2d Cir., 1984]). It ought to be clear that plaintiff cannot now establish the deprivation of any federal right. Although plaintiff has established that defendant cable company took her property under color of state law, that alone does not mount to the deprivation of a right. Plaintiff has not shown that her property has been taken without just compensation or due process, and, thus has not demonstrated that the taking which was itself authorized pursuant to a decidedly unobjectionable exercise of the state's police power (458 US 419, 425-426) was effected in a manner violative of her federal rights. As the U.S. Supreme Court has recently observed, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation (citations omit-

ted)". (Williamson Planning Commission v. Hamilton Bank, 473 US 172, 194 [1985]). The fact that a taking has occurred under color of state law is a necessary condition of plaintiff's 42 USC § 1983 claim, but it is not in itself sufficient to sustain the claim. Until plaintiff applies for just compensation, utilizing the procedures therefor set forth in the Executive Law and regulations promulgated pursuant thereto, and is denied the compensation she seeks she is not in a position to allege sufficiently, much less prove, the denial of any federal statutory constitutional right. The Supreme Court has observed quite pointedly: "because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the

constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." (emphasis in original). (Id. at 194 n. 13; see also Id. 194-195).

The conclusion which follows is that plaintiff, who to date has not utilized the procedures to obtain compensation which have existed in substantially the form they do today since the enactment of Executive Law § 828 in 1972, cannot now make a § 1983 claim. If she cannot make a § 1983 claim, neither may she seek attorneys' fees as a "prevailing party" pursuant to 42 USC § 1988. Thus, it was error for Special Term to hold that plaintiff was a "prevailing party" within the meaning of 42 USC § 1988. The motion should simply have been denied on the ground that plaintiff

failed to plead and prove any underlying constitutional violation.

As there presently exists no ground to believe that there will be an award of attorneys' fees pursuant to 42 USC §§ 1983 and 1988 in this action, it is necessary to address plaintiff's alternative claim for a fee award pursuant to CPLR 909.

Although a class was certified in this action and the action has been referred to as a class action, the action has not been maintained as such; no notice was ever sent the class. Moreover, the outcome of plaintiff's 11 year effort is that plaintiff and the members of her putative class are consigned to essentially the same process for obtaining compensation as has existed ever since the enactment of Executive Law § 828. Unless, as seems altogether

improbable, it is eventually judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 828 compensatory scheme (in most cases $1.00) does not amount to just compensation within the meaning of the constitution, plaintiff will not have succeeded in conferring any tangible benefit upon the putative class. At this juncture in the litigation petitioner has prevailed in no more than establishing that the activity authorized by Executive Law §828 does constitute a taking. This, however, is of purely academic interest since, as a practical matter, there is little reason to believe that landlords will receive any greater amount in what is now denominated "just compensation" than they would have previously in what was then termed "reasonable compensation". As

Justice Blackmun perceptively noted in his dissent when this matter was before the U.S. Supreme Court, "If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment." (Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419, 456 ftn. 12). We do not think CPLR 909 is correctly used to finance, and thereby encourage, the litigation of claims which have proven as insubstantial as those here made by the plaintiff. The motion for attorneys' fees pursuant to CPLR 909 should then have been denied by Special Term for the aforestated reasons.

We note that even if attorneys' fees were eventually to be awarded pursuant to CPLR 909 they would be properly payable out of the judgment fund, if any, that resulted from the lawsuit. Justice does not require (See CPLR 909 supra) that plaintiff's adversaries, who have at all times acted in good faith, (See Loretto v. Teleprompter Manhattan CATV Corp., 58 NY2d 143, 153) should be forced to pay plaintiff's attorneys. Thus, assuming that this action should be permitted to continue as a class action -- a doubtful proposition considering that the original complaint has been dismissed and that the Court of Appeals has approved the administrative procedures pursuant to which each landlord may seek compensation on an in-

dividual basis[2] -- computation of an award of attorneys' fees if otherwise appropriate, would have to be deferred until such time, if ever, as there existed a judgment fund out of which the fees could be paid.

Having affirmed the denial of plaintiff's motion for the abovestated reasons, we do not think it necessary to reach the State's claim that sovereign immunity insulates it from attorney fee liability under either 42 USC §§ 1983 and 1988 or CPLR 909.

All concur.

Order filed.

[December 15, 1987]

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2 We note that plaintiff conceded on her motion to reargue before Special Term that "any further proceedings in the State Commission on Cable Television must necessarily be conducted on behalf of individual applicants."

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 15, 1987.

Present - Hon. Francis T. Murphy,
Presiding Justice,
Leonard H. Sandler,
E. Leo Milonas,
Ernst H. Rosenberger,
George Bundy Smith,
Justices.

JEAN LORETTO, on behalf of herself and all others similarly situated.

Plaintiff-Appellant-Respondent,

-against-

GROUP W. CABLE, INC. and CITY OF NEW YORK.

Defendants-Respondents-Appellants,

Attorney General of the State of New York,

Intervenor-Respondent.

M-1120
M-1491
M-1526
M-1546

[Appeal Nos. 29128-29N]

The above-named plaintiff-appellant-respondent having moved for reargument or leave to appeal to the Court of Appeals from this Court's order entered on February 10, 1987,

And the defendants-respondents-appellants and intervenor-respondent having each cross-moved for leave to appeal to the Court of Appeals from said order of this Court,

Now, upon reading and filing the papers with respect to the motion and cross-motions and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is ordered that plaintiff-appellant-respondent's motion be and the same hereby is denied.

It is further ordered that the cross-motions for leave to appeal to the

Court of Appeals are hereby granted to the extent of deeming the cross-motions as ones for reargument, which are hereby granted, and upon reargument, the Court adheres to its determination as contained in this Court's order entered on February 10, 1987.

ENTER:

/s/ Harold J. Reynolds

Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 10, 1987.

Present - Hon. Francis T. Murphy,
Presiding Justice,
Leonard H. Sandler,
E. Leo Milonas,
Ernst H. Rosenberger,
George Bundy Smith,
Justices.

JEAN LORETTO, on behalf of herself and all others similarly situated.

Plaintiff-Appellant-Respondent,

-against-

GROUP W. CABLE, INC. and CITY OF NEW YORK.

Defendants-Respondents-Appellants,

Attorney General of the State of New York,

Intervenor-Respondent.

29128-29N

An appeal and cross-appeal having been taken to this Court by the above-named appellants from two orders of the Supreme Court, New York County (Alfred Ascione, J.), entered on or about June 28, 1985, and December 13, 1985, respectively,

And said appeal and cross-appeal having been argued by Michael S. Gruen of counsel for plaintiff-appellant-respondent, by Michael Lesch, John G. Micolich and George G. Nelson of counsel for defendant-respondent-appellant Group W. Cable, Inc., by Pamela Seider Dolgow and Elizabeth S. Natrella of counsel for defendant-respondent-appellant City of New York, and by Judith A. Gordon of counsel for intervenor-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order entered on or about June 28, 1985 so appealed from be and the same hereby is affirmed, without costs and without disbursements. The appeal from the order entered on December 13, 1985 be and the same hereby unanimously dismissed as nonappealable.

ENTER:

/s/ Harold J. Reynolds

Clerk.

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated.

Plaintiff, Index No. 8300/76

-against-

#89 of 3/13/85

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Defendants.

----------x

ALFRED M. ASCIONE, J.:

Counsel for plaintiff seeks attorneys' fees as well as costs and disbursements against Group W. Cable, Inc. ("Group W", the successor to the Teleprompter defendants) as well as New York City and the State of New York.

The movants acted as counsel for plaintiff as to this proceeding. They seek attorneys' fees pursuant to CPLR 909 and 42 U.S.C.A. 1988. This action

was brought as a class action in regard to an estimated 16,000 television installations. The legal battle was carried through the entire New York State court system up to the Court of Appeals and then to the United States Supreme Court. Movants seek almost $1.5 million in fees plus the vacatur of awards previously obtained against the plaintiff. Movants also move to amend the caption of the action to reflect the fact the Teleprompter defendants have been merged in Group W Cable, Inc.

Plaintiff commenced this proceeding in 1976 in which she sought damages on her behalf and on the behalf of other real property owners in a similar position caused by what she claimed was an unconstitutional taking of private property on the part of the Teleprompter defendants by installing cables and

other cable television components without compensation nor consent of the owners. Plaintiff contends the cables, etc. were installed pursuant to Executive Law, § 828. Plaintiff states that prior to the enactment of § 828 (its effective date was January 1, 1973), the cable television companies sought permission before they installed their equipment and paid the owner 5% of the gross receipts realized from those installations. After § 828 was enacted, plaintiff charges the State Cable Television Commission with the help of the cable companies arbitrarily set all applications from owners for compensation at one dollar ($1.00). Thus, faced with this conduct, plaintiff claims her only recourse was to begin this proceeding.

Movants point out that the Teleprompter defendants had able counsel, all aspects of the action that could be were litigated. Movants note the Teleprompter defendants were joined by the State of New York and New York City. All this, movants claim, amounted to a great deal of work. Movants contend the State of New York by the Attorney General exceeded its mandate under Executive Law § 72 in defending the constitutionality of § 828 and in effect made itself a true party defendant.

In the Supreme Court, Special Term, Part I, Justice Grossman granted summary judgment in Teleprompter defendants' favor (98 Misc.2d 944). The decision was affirmed in the Appellate Division, First Department (73 AD2d 849). The Court of Appeals (53 NY2d 124), also

affirmed (and the Court concluded the $1 payment was not required).

The U.S. Supreme Court (458 U.S. 419, 102 S. Ct. 3164) in June, 1982, held that any governmentally authorized continuing installation on private property, no matter how trivial and for whatever purpose constitutes a "per se" taking which must be compensated under the 14th Amendment.

Thus, the U.S. Supreme Court reversed the Court of Appeals and it remanded the action for further proceedings not inconsistent with its verdict. The Court of Appeals determined damages should be determined by the State Cable Television Commission (58 NY2d 143).

Movants contend their efforts have resulted in considerable benefits to the class in that the members thereof are entitled to a "just compensation" in

that a taking has occurred (movants project the pool for such compensation based on 5% of the installation fees stand in excess of $9 million at the end of 1982), and the short statute of limitations (60 days) set forth in Executive Law § 828 was declared invalid. Further, movants claim the State Cable Television Commission has adopted new rules (with recommendations by movants) wherein the rights of the property owners as to their ability to recover from cable television companies have been extended.

Movants have set forth in detail the experience and the time expended in this proceeding. Thus, the movants request the counsel fees. Also, a judgment for a bill of costs of defendants was entered in April, 1979 for $300 and defendants filed a bill of costs for

$863.73 in June, 1981 (no judgment has been entered on this). Based on the U.S. Supreme Count decision, movants state these should be vacated.

In reply, Group W opposes the motion for fees on the ground plaintiff was not the prevailing party, the action has been based on claims of trespass and not on the enforcement of a federal right, the action herein has never been maintained as a class action (she was permitted to do so, but the notice to class was adjourned, contends Group W), and no judgment has been entered in favor of the putative class. Also Group W alleges plaintiff has not maintained any tangible benefit for herself or her class (Group W has presented affidavits from its employees which state the landlords have been served with notices of intention to install cable equipment and

the landlords' rights to apply for just compensation as per the new rules of the State Commission on Cable Television but Group W has not received any copies of applications for compensation (thus emphasizing the plaintiff's efforts were for naught).

Group W maintains the only party conceivably guilty of any wrongdoing is the State Commission on Cable Television and the State of New York. Group W contends the plaintiff's success against the State can be classified as a "hint of success". Group W maintains the fact that it (or its predecessors) was regulated by the State does not implicate it nor does it provide a basis for fees under 42 U.S.C.A. §§ 1983, 1988.

Finally, Group W challenges plaintiff's proof for fees is insufficient and the request is excessive. Defendant

City of New York basically agrees with the arguments set forth by Group W (plaintiff has not "prevailed", etc.), and contends it is not liable due to municipality immunity under 42 U.S.C.A. § 1983 (the State of New York did not oppose the instant motion.).

In New York, the general rule is that each litigant is required to absorb the cost of his own attorneys' fees, and a defendant may not be required to pay plaintiff's fees in the absence of a contractual or statutory liability (Mighty Midget v Centennial Insurance Co., 47 NY2d 12).

42 U.S.C.A. § 1988 and CPLR § 909 represent the exceptions to the general rule. 42 U.S.C.A. § 1983 imposes liability on those who under color of law, custom or usage of any state or territory deprive other persons of rights,

privileges or immunities secured by the Federal Constitution. (Gomez v Toledo, 446 U.S. 635). § 42 U.S.C.A. § 1988 states in part; "In any action or proceeding to enforce a provision of section[s] ... 1983 ... the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Attorneys' fees may be awarded pursuant to § 1988 in a state court proceeding (See New York Gaslight Club v Carey, 447 U.S. 54).

The 1976 Civil Rights Attorney's Fees Award Act (42 U.S.C.A. § 1988) sought to create a system of "private attorney generals" to pursue national policy who would be paid by an award of attorney's fees for representing a successful or prevailing party (North-Cross v Memphis Board of Education, 412 U.S.

427). Certainly, fees would be available if it is found the challenged acts violate the prevailing party's constitutional rights (Johnson v Blum, 58 NY2d 454). It is only where the respondents established special circumstances (this would also refer to the State and City defendants. See Riddell v National Democratic Party, 624 F2d 539) which mitigate against awarding a fee to a successful litigant (See Mid-Hudson Legal Services, Inc. v G & U, Inc., 578 F2d 34). Fees are not limited to defendants who have acted in bad faith (See Christianburg Garment Co. v E.E.O.C., 434 U.S. 412; P.S.I. v Carey, 476 F. Supp. 4).

Thus, no bad faith need be shown by plaintiff, and no special circumstances are presented by defendants herein which would preclude plaintiff from obtaining

attorney's fees (Hensley v Eckerhart, 461 U.S. 424; See Carrion v Yeshiva University, 535 F2d 722 where fees were denied plaintiff when it was concluded the litigation "was motivated by malice and vindictiveness and that it was without merit" p. 728). Further, defendants would be able to attempt to show special circumstances if a hearing on the fees is required.

This brings us to the query: was plaintiff a prevailing party under § 42 U.S.C.A. § 1983 so as to be entitled to attorney's fees under § 42 U.S.C.A. § 1988.

First, the plaintiff was not required to specifically plead 42 U.S.C.A. 1983 as to sustain a § 1983 claim against a person or municipality, plaintiff must allege the municipality acted in violation of the plaintiff's federal-

ly guaranteed rights (Klimzak v City of Chicago, 539 F. Supp. 221).

In determining whether to award attorneys' fees in a Civil rights case, the issue as to whether the claimant is a "prevailing party" presents an inquiry which is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy (Bonnes v Long, 599 F2d 1316). Initially, the court should consider the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden; then the outcome must be considered, in whatever form realized, is one which plaintiff's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from a burden when measured against the

results sought (Bonnes v Long, supra). Thus, one focuses on the relief ultimately received, not the substantive merits of plaintiff's original claims (Bagby v Beal, 606 F2d 411).

As to the plaintiff, she must be deemed a "prevailing party."

The U.S. Supreme Court, in Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419, found § 828 of the Executive Law worked a taking of the plaintiff's property under color of state law for which she is entitled to just compensation under the Fourteenth Amendment instead of the $1, among other accomplishments recited by plaintiff (infra). Further plaintiff served as a "catalyst" (See Parkam v Southern Bell Telephone Co., 433 F2d 421) in obtaining reformation of the recourse available to land-

lords regarding cable television installations.

The fact that the original complaint was "dismissed" and "just compensation" was to be set by the New York State Commission on Cable Television (with this court to review such findings) constitutes merely a technical termination of the complaint wherein the "just compensation" burden has been shifted to a state agency (with the normal Article 78 proceeding possible).

Certainly, the above does not deprive the plaintiff of the status of a prevailing party entitled to reasonable attorneys' fees under U.S.C.A. §§ 1983, 1988 including those from the State of New York (see Alyeska Pipeline Service Co. v Wilderness Society, 421 U.S. 240). Although the state was not named as a party defendant, the relief sought by

plaintiff - for all practical purposes aimed at the Executive Law and the State Commission on Cable Television and the conduct of the Attorney General - in effect made the State of New York a party subject to attorney fees (See Butto v Finney, 437 U.S. 678) all of those ultimately awarded. Certainly, the defendant City, considered a "person" under 42 U.S.C.A. § 1983, while not entitled to absolute immunity thereunder (Morell v Dept. of Social Services of the City of New York, 436 U.S. 658) certainly should shoulder its fair share of reasonable attorneys' fees.

Although it is not necessary at this point to determine whether a viable class action exists here since both the federal and state courts have concurrent jurisdiction over cases alleging violations of 42 U.S.C.A. § 1983 (Young v

Board of Education, 416 F. Supp. 1139; Cooper v Morin, 50 AD2d 32) and thus both may award reasonable fees pursuant to § 1988, the court feels a viable class action under CPLR Article 9 does exist (See CPLR § 901). There exists an order allowing the class action to exist. Further, the Court of Appeals labeled the proceeding a class action (Loretto v Teleprompter, 53 N.Y.2d 124, 133 noting no notice had been given. This court does not see why notice cannot now be given).

In either case, City of Detroit v Grinnell Corp., 495 F2d 448, 470, lists factors to be considered in fixing attorneys' fees (such as 1) whether counsel had the benefit of a prior judgment or a decree in a case brought by the government, 2) standing of counsel, 3) time and labor, 4) magnitude and

complexity of the litigation, 5) responsibility undertaken, 6) amount recovered, 7) arguments, conferences prior to trial, 8) what it would be practicable for counsel to charge a victorious plaintiff. Additional factors such as the risk in litigation, the novelty of the risk presented, and the skill required to obtain a good result. See Washington Federal Savings and Loan Association v Village Mall Townhouses, Inc., 90 Misc.2d 227).

Consistent with the traditional request in this type of proceeding, the judgment fund and its accrued interest is the appropriate source for the payment of plaintiff's attorneys' fees rather than from defendants in a successful class action (Steinberg v Citicorp Credit Services, 110 Misc.2d 804) although the existence of such a fund is

not necessary for an award of fees (Suffolk Housing Services v Town of Brookhaven, 69 AD2d 242).

The court feels the request by counsel for fees at this point is premature. In order to evaluate the true impact of plaintiff's actions and the efforts therby [sic] of her counsel, the court agrees with defendants that the plaintiff should proceed to the State Commission on Cable Television to enable it to assess the "just compensation." If the plaintiff's allegations are true (that there are 16,000 members affected with $9 plus million dollars due), said allegations would provide the requisite pool for attorneys' fees while still providing plaintiff and others with just compensation. A hearing or presentation before the Commission would determine this (along, no doubt, with an Arti-

cle 78 proceeding, another reason this motion is premature) at that point counsel may renew its request, and it will receive full and complete consideration.

Acccrdingly, the motion for counsel fees and costs is denied as premature with leave to renew at the appropriate time. The motion is granted to the extent that the complaint may be amended in that Group W may be substituted for the Teleprompter defendants.

DATED: June 25th, 1985

/s/ AMA
J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present:
HON. ALFRED M. ASCIONE, JUSTICE.

----------x

JEAN LORETTO, etc.

-against-

TELEPROMPTER MANHATTAN CATV CORPORATION et al.

----------x

The following papers numbered 1 to 15 read on this motion, SUBMITTED

	Papers Numbered
No. 89 on Calendar of MAR 13 1985	
Notice of Motion and Affidavits Annexed	1-5
Answering Affidavits	6-13
* * *	
Exhibits 2 Volumes	14-15
Stipulation-Referee's Report-Minutes	

* * *

Upon the foregoing papers this Motion is decided in accordance with accompanying memorandum decision.

Dated JUN 25 1985 /s/ AMA
J.S.C.

Briefs: Plaintiff's xxx Defendant's xx

* * *

County Clerk's No. 8300 1976

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated.

Index No. 8300/76

Plaintiff,

-against-

#130 of 10/23/85

GROUP W. CABLE, INC. and CITY OF NEW YORK,

Defendants.

----------x

ALFRED M. ASCIONE, J.:

The motion and cross motion for reargument are denied. The movants have failed to demonstrate that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (see West Realty Co. v. City of New York, 99 AD2d 708).

The court feels the parties must exhaust their administrative remedies

before "just compensation" may be dispensed. The exhaustion of administrative remedies will provide a clear picture of the true impact of the plaintiff's efforts. This would include where there had been a "taking" of the property of the plaintiffs. This court in its prior determination and the Court of Appeals (see Loretto v. Teleprompter Manhattan CATV Corp., 58 NY2d 143, 147) felt the next step for the fixation of any compensation should be made by the New York State Commission on Cable Television. The parties should exhaust their administrative remedies whereby "just compensation" may be dispensed. Utilizing the administrative procedures will provide a clear picture of the true actual impact of the efforts of the plaintiff Jean Loretto and her counsel.

The doctrine of the exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals rather than the courts and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the court (see Y.M.C.A. v. Rochester Pure Waters District, 37 NY2d 371). This permits the agency an opportunity of develop factual findings to apply its expertise to new issues and to exercise its discretionary powers (see Touche Ross & Co. v. S.E.C., 609 F2d 570).

The Commission on Cable Television, using its expertise, should be permitted to make a determination as to what is "just compensation". Such a determination would be reviewable pursuant to Article 78 with the advantage of a full record. This court cannot make such a

determination now. In light of the fact counsel for the plaintiff seeks in excess of $500,000 in counsel fees, proper procedures should not be short circuited even if each individual plaintiff must commence his or her own proceeding before the commission (a measure of the "impact" of the plaintiff Lorreto's effort?). Any request for relief (from plaintiff or defendants) at this point in the proceeding is totally premature including the issue of costs.

DATED: DEC 6, 1985

/s/ AMA
J. S. C.

FILED December 13, 1985
County Clerk's Office
New York

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART I, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present:
HON. ALFRED M. ASCIONE, JUSTICE.

----------x

JEAN LORETTO

-against-

GROUP W CABLE , INC. et ano

----------x

The following papers numbered 1 to 8 read on this motion, SUBMITTED & REFERRED

	Papers Numbered
No. 130 on Calendar of OCT 23 1985	
Order to Show Cause and Affidavits Annexed	1&2
Answering Affidavit & Cross-Motion	5-6
Replying Affidavit & Exhibits A-E	7-8
* * *	
Affidavit of Service	3-4
* * *	

Upon the foregoing papers this Motion is decided in accordance with accompanying memorandum decision.

Dated DEC 6 1985 /s/ AMA
J.S.C.

Briefs: Plaintiff's xx Defendant's x
County Clerk's No. 8300, 1976
Spec I Liber L117 Line 2, 1985

FILED December 13, 1985
County Clerk's Office
New York

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 17 OPINION
JEAN LORETTO, &c.,
Appellant,

TELEPROMPTER MANHATTAN
CATV CORP., et al.,
Respondents.

MEYER, J.

The Supreme Court in reversing our order of affirmance in this case (457 U.S. ____, 102 S. Ct. 3164, 73 L.Ed.2d 868 revg. 53 N.Y.2d 124, 440 N.Y.S.2d 843, 423 N.E.2d 320)[1] and remanding to us for further proceedings not inconsistent with its opinion did not question our holding that section 828 of the Executive Law was a proper exercise of the police power (457 U.S. at p. ____, 102 S. Ct. at pp. 3170-3171) but held

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1 Relevant facts are set forth in our earlier opinion and will not be repeated here, familiarity with that opinion being assumed.

that the "otherwise valid regulation so frustrates property rights that compensation must be paid" (id; see also, 457 U.S. at p. ____, 102 S. Ct. at p. 3179). It expressed no opinion, however, on the amount of compensation due, leaving that question for the courts of this State to determine on remand (457 U.S. at p. ____, 102 S. Ct. at p. 3179).

Before us on remand, plaintiff argues (1) that, her action being in trespass and defendant TelePrompter being without power to condemn, she is entitled to damages on a trespass theory; (2) that section 828 of the Executive Law does not authorize the commission it creates to adjudicate compensation or provide for compensation as to crossover installations; and (3) that the section is unconstitutional because it violates the separation of powers doctrine, and

fails to provide for compensation or security in advance of taking, and violates due process in that notice is not given the owner and that the commission is biased.[2] We conclude that the judgment, 98 Misc. 2d 944, 415 N.Y.S.2d 180, entered by Special Term should be modified (1) to make clear that its declaration of the validity of section 828 is subject to the fixation of compensation by the commission upon application to it, (2) to declare the commission's regulation 598.3 (9 NYCRR 598.3) inva-

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2 She also asks that we fix the rule of damages and pass upon various procedural questions denied by Special Term as moot. Concluding as we do that compensation is to be fixed by the commission subject to review, we do not reach the damage issue. As to the procedural issues, our order is without prejudice to the representation by either party to Special Term of any appropriate issue, including any previously dismissed as moot.

lid, and (3) to retain jurisdiction for the purpose of reviewing whether the compensation fixed by the commission constitutes just compensation within the meaning of the Constitution, but to permit plaintiff, if she be so advised, to proceed with her action in trespass for the period between February 28, 1972, the date on which she took title to 303 West 105th Street, and January 1, 1973, the effective date of section 828. Except as so modified, the judgment should he affirmed, with costs to plaintiff.

I

We held and the Supreme Court agreed that section 828 is a valid exercise of the police power. From the effective date of that section, therefore, Tele-Prompter's "invasion" of plaintiff's property was in pursuance of law and not

a trespass (Brewster v. Rogers Co., 169 N.Y. 73, 80, 62 N.E. 164). As to the period between plaintiff's acquisition of title and the effective date of the section there are, as outlined in our earlier opinion (53 N.Y.2d at pp. 134-136, 440 N.Y.S.2d 843, 423 N.E.2d 320), issues of fact. TelePrompter is, therefore, entitled to partial summary judgment making the declarations outlined above, but as to the period before December 31, 1972, permitting the action to proceed.

Plaintiff argues, however, that although TelePrompter Manhattan was formed under the Transportation Corporations Law it lost its power of condemnation under that law when it was merged into TelePrompter Corporation, a stock corporation, because neither the merger plan nor the certificate of incorpora-

tion of the surviving corporation stated that the power of condemnation was retained. We do not pause to consider whether the power to condemn is essential (see Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870) or whether, as defendants urge, sections 906 (subd. [b], par. [1]) of the Business Corporation Law and section 5 of the Transportation Corporations Law may be read to continue the condemnation power in the surviving stock corporation nonetheless (see Matter of City of New York [New York Water Serv. Corp.], 296 N.Y. 1016, 73 N.E.2d 724, affg. 271 App. Div. 1019, 69 N.Y.S.2d 508, affg. 67 N.Y.S.2d 850, 853 (Sup.); cf. Kittinger v. Churchill, 161 Misc. 3, 14, 292 N.Y.S. 35, affd. on opn. below 249 App. Div. 703, 292 N.Y.S. 51). Accepting the certified documents

of which both sides urge that we take judicial notice (see People v. Flack, 216 N.Y. 223, 110 N.E. 167; Cohen and Karger, Powers of the New York Court of Appeals [rev. ed.], § 168), we conclude that, the merger of TelePrompter Manhattan into TelePrompter Corporation not having occurred until almost two years after the present action was begun and TelePrompter Corporation having thereafter been merged into Group W Cable Inc., a corporation incorporated under the Transportation Corporations Law, the argument, whatever its merit during the hiatus, should not be permitted to frustrate the purpose of the Legislature (see Executive Law, § 811) in enacting section 828 (see Knoth v. Manhattan Ry. Co., 187 N.Y. 243, 252, 79 N.E. 1015; Penthouse Props. v. 1158 Fifth Ave., 256 App. Div. 685, 692, 11 N.Y.S.2d 417; cf.

Zion v. Kurtz, 50 N.Y.2d 92, 102, 428 N.Y.S.2d 199, 405 N.E.2d 681).

For the period prior to enactment of section 828 plaintiff may maintain her action in trespass, therefore, but unless one of her remaining arguments is valid, she is entitled for the period after that date only to compensation as fixed by the commission.

II

We turn then to plaintiff's statutory arguments and note, first, that the United States Supreme Court having held that the character of the governmental action involved in section 828 is a taking which entitles a property owner affected by it to compensation, the section is to be construed so as to sustain its constitutionality in light of that holding if possible (People v. Ferber, 52 N.Y.2d 674, 678, 439 N.Y.S.2d

863, 422 N.E.2d 523; Matter of Lorie C., 49 N.Y.2d 161, 171, 424 N.Y.S.2d 395, 400 N.E.2d 336; People v. Bell, 306 N.Y. 110, 114, 115 N.E.2d 821; McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 150, subd. c). So much of our prior decision as reasoned that the Legislature intended to act under the police power only and not to require the payment of compensation having been invalidated by the Supreme Court's holding, the question becomes whether the language of the statute admits of a construction which provides a method for the determination of compensation for crossover and noncrossover situations. We conclude that it does.

Section 828 (subd. 1, par. b) expressly empowers the commission to determine the reasonable amount to be paid by a cable television company to a prop-

erty owner in exchange for permitting cable television service on his property; subdivision 3 of section 816 authorizes the commission to compel the production of papers, the attendance of witnesses and their examination under oath in order to obtain the information necessary to administer any provision of article 28 of the Executive Law; and subdivision 5 of the same section grants to the commission "all other powers necessary or appropriate to carry out the purposes" of the article. The commission is, therefore, empowered to fix reasonable compensation for a taking and provided with the procedural means for adjudication of that issue. The only seemingly contrary indication in the statute is the presence of the words "by regulation" in section 828 (subd. 1, par. b). However, those words when read

in context are not inconsistent with the power of adjudication given the commission by section 816; what paragraph b of subdivision 1 does is authorize the commission to limit by regulation the highest amount a property owner may receive, unless on application by the property owner to the commission that body, after a section 816 hearing, fixes a higher sum as the reasonable compensation for the particular property.[3] The

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3 Although as noted in footnote 2 we do not now determine the measure of damages, that being for the commission in the first instance, we note, in light of the Supreme Court's ruling, that reasonable compensation does not differ from just compensation, which as a constitutional concept requires the fixing of compensation as of the time of the taking (in plaintiff's case, January 1, 1973, the effective date of section 828) plus interest at the legal rate as it existed during the period between that date and the payment made as a result of the commission determination (City of Buffalo v. Clement Co., 28 N.Y.2d

(Footnote 3 continued on next page)

commission's regulations are entirely consistent with its being so empowered for they expressly provide (9 N.Y.CRR 598.1-598.7) for just such an application and determination and establish rules as to pleadings, hearing and practice before the commission (9 N.Y.CRR 590.3, 590.4, 590.6-590.10, 590.51-590.59) fully compatible with the usual process of adjudication.

For a number of reasons the exclusivity provision of the Eminent Domain Procedure Law (EDPL 101) does not, as

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(Footnote 3 continued from previous page) 241, 254, 266, 321 N.Y.S.2d 345, 269 N.E.2d 895; see San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 656-659, 101 S. Ct. 1287, 1306-1307, 67 L. Ed.2d 551 [Brennan, J., dissenting, but note that three other Justices joined in the dissent and that Justice Rehnquist, while concurring in the majority's dismissal on jurisdictional grounds, announced his acceptance of the principles stated in the Brennan dissent]).

plaintiff suggests, require a contrary conclusion. Foremost is that what we are construing is an Executive Law provision specially enacted to deal with and promote the cable television industry, containing express provision for the determination of reasonable compensation in other than a condemnation context but which, because it has now been held to constitute a de facto taking, must be applied in that context. The procedure established in the Executive Law was established in light of the expertise of the cable television commission, the small amount of space occupied by cable facilities and the large number of individual properties that would be involved if the legislative purpose of "maximum penetration * * * as rapidly as feasible" (Executive Law, § 811) was to be accomplished. It was

enacted three and a half years before the Eminent Domain Procedure Law and was not mentioned in chapter 840 of the Laws of 1977 by which some 30 different laws were amended or repealed in order to conform their provisions to the EDPL. The EDPL being a general rather than a special law, section 828 procedures should not be held to have been superseded by its provisions, the more particularly so because to do so would require first instance court processing of a large number of small claims intended to be dealt with in the courts only by way of review of the commission's determination (see People v. Mann, 31 N.Y.2d 253, 257-258, 336 N.Y.S.2d 633, 288 N.E.2d 595; McKinney's Cons. Laws of N.Y., Book 1, Statutes, §§ 396, 398).[4]

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4 As to the instant action, a further reason that EDPL does not apply is
(Footnote 4 continued on next page)

Nor do crossover installations present a problem in construing the statute. The conclusion reached in our prior opinion was "that the Legislature intended to proscribe interference with access for installation of facilities on the property for whatever purpose without any provision for payment" (53 N.Y.2d at p. 142, 440 N.Y.S.2d 843, 423 N.E.2d 320; emphasis added). The Supreme Court has now held that the Constitution requires payment for both crossover and noncrossover facilities (457 U.S. at p. ____, 102 S. Ct. at

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(Footnote 4 continued from previous page)
section 706 of that law, which expressly provides that an action pending on the effective date of the chapter "may be prosecuted as if this chapter had not been enacted." The present action was begun two and a half years before the effective date of EDPL. We prefer, however, to base our conclusion upon the reasoning set forth in the text.

p. 3178) and the procedural provisions of section 816 are clearly broad enough to encompass determination of compensation for either or both. Although the commission's rules (9 N.Y.CRR 598.1-598.7) do not as presently written expressly include crossovers, they must, as a result of the Supreme Court's holding, be construed impliedly to include them and, we have no doubt, will be promptly amended to conform to that holding.

III

There remain for consideration the alleged constitutional flaws.

A

Plaintiff's separation of powers arguments do not withstand analysis. Neither the Federal nor the State Constitution proscribes determination of compensation for a taking by a commis-

sion rather than a court. Thus in Bauman v. Ross, 167 U.S. 548, 593, 17 S. Ct. 966, 42 L.Ed. 270, the Supreme Court approved of commissioners "appointed by a court or by the executive" and former paragraph (b) of section 7 of article 1 of the New York Constitution, which was repealed in 1964 as "obsolete and superfluous" (McKinney's Cons. Laws of N.Y., Book 2, N.Y. Const., Art. 1, § 7, Historical Note), authorized determination of compensation by commissioners. Plaintiff's emphasis on our reference in Matter of Keystone Assoc. v. Moerdler, 19 N.Y.2d 78, 89, 278 N.Y.S.2d 185, 224 N.E.2d 700, to the determination of compensation as a judicial function is misplaced. What was there held, as the citation of Matter of City of New York (Fifth Ave. Coach Lines), 18 N.Y.2d 212, 218, 273 N.Y.S.2d 52, 219 N.E.2d 410,

shows, was that the Legislature may not itself fix compensation, not that it may not authorize the first instance determination of compensation by commissioners or a commission, subject to later judicial review.

Nothing in article VI of the New York Constitution requires a contrary conclusion. United Baking Co. v. Bakery and Confectionery Workers' Union, 257 App. Div. 501, 14 N.Y.S.2d 74, on which plaintiff relies, is distinguishable, for there the agency's findings would not have been subject to review (id. at p. 506, 14 N.Y.S.2d 74), whereas under section 828 the commission's determination is subject to review, in the instant case, in this proceeding and, in cases not similarly arising, by article 78 review. Nor does subdivision b of section 7 of Article VI of the Cons-

titution require, as plaintiff suggests, that the Supreme Court have "concurrent jurisdiction along with any other court or agency" (emphasis supplied). The subdivision makes no reference whatsoever to agencies as distinct from courts and plaintiff points to nothing else to suggest that administrative agencies cannot be given a first instance adjudicatory function, subject to judicial review.

B

Although advance payment or the provision of security for payment of compensation is the general rule when property is taken for a private use, neither is an absolute in the law of just compensation (Brickett v. Haverhill Aqueduct Co., 142 Mass. 394, 8 N.E. 119; see Cherokee Nation v. Kansas Ry. Co., 135 U.S. 641, 10 S. Ct. 965, 34 L. Ed. 295;

American Tel. & Tel. Co. of N.J., 128 N.J. Super. 238, 319 A.2d 754). The Constitution does not require that the statutory aim of "rapid development of the cable television industry" (Executive Law, § 811; see also § 815, subd. [2], par. [d], cl. [iii]) be frustrated under the circumstances of this case, where TelePrompter has proceeded in good faith under a statutory license not conditioned upon the advance payment of or security for compensation but which must now, as a result of the Supreme Court's ruling, be construed to require adequate compensation. The critical inquiry is whether the due process requirement of just compensation has been met. Where, as here, so far as the record discloses (1) the amount receivable by any single property owner is small, (2) the damage to such an

owner's property by attachment of cable facilities relatively insignificant, (3) TelePrompter has offered in light of the Supreme Court's ruling to post a bond, and (4) the powers of the commission are broad enough to encompass a requirement by rule or order or both of advance payment or security as deemed necessary to assure the adequacy of compensation as to both amount and certainty of payment and Special Term on remand to it will have similar power, there is reasonable certainty that plaintiff and the members of the class as finally determined will receive just compensation for the takings that have resulted from TelePrompter's various entries pursuant to statutory leave. It would, of course, had the statutory scheme been envisioned by the Legislature as a taking, have been better had

the statute included explicit provisions dealing with the problem. Under the circumstances of this case, however, it would be an exaltation of form over substance to invalidate the statutory license, authorized as the Supreme Court has held by the police power, on such a basis.

C

The due process objection predicated on commission bias is sufficiently answered by Withrow v. Larkin, 421 U.S. 35, 56-58, 95 S. Ct. 1456, 1469-1470, 43 L. Ed.2d 712 and Richardson v. Perales, 402 U.S. 389, 410, 91 S. Ct. 1420, 1431, 28 L. Ed.2d 842 and need not be discussed further. Equally unavailing is the suggestion of constitutional impropriety claimed to result from the assessment provisions of section 817 of the Executive Law (People ex rel. New

York Elec. Lines Co. v. Squire, 107 N.Y. 593, 602, 14 N.E. 820, affd. 145 U.S. 175, 12 S. Ct. 880, 36 L. Ed. 666; see, also, Matter of Kings County Light. Co. v. Maltbie, 244 App. Div. 475, 280 N.Y.S. 560). Notably, unlike Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed.2d 267, there is here no such direct relationship between the commission's finances and its determination of compensation to be paid by CATV companies to property owners as to constitute a denial of due process.

Plaintiff's remaining due process arguments relate to the fact that notice is not required to be given and that the commission's regulations (9 N.Y.CRR 598.3) require that an owner's application be made within 60 days after October 30, 1973 or the date of installation, whichever is later. The notice

problem is not properly before us (see Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, 255 N.E.2d 158; Cohen and Karger, Powers of the New York Court of Appeals [rev. ed.], p. 641), but in any event appears from the stipulated facts no longer to present a problem. The limitation upon presentation of a claim, framed in the context of a police power rather than a condemnation statute, could be construed by the commission to bar claims as to which an owner did not in fact have notice in time to comply with the regulation. Nothing in the statute required the adoption of such a regulation, however, or prevents the commission from adopting a new regulation relating the limitation period to the service of notice upon a property owner. Such problem as the present regulation creates will be sufficiently

taken care of by modifying the judgment to declare the regulation invalid but does not require invalidation of the underlying statute.

For the reasons set forth above the order of the Appellate Division, 73 A.D.2d 849, 422 N.Y.S.2d 550, should be modified, with costs to appellant, and the case remitted to Supreme Court, New York County, for further proceedings in accordance with this opinion and, as so modified, affirmed.

[COOKE, C.J., and JASEN, JONES, WACHTLER, FUCHSBERG and SIMONS, JJ., concur.]

Upon reargument, following remand by the Supreme Court of the United States, order modified, with costs to appellant, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Decided February 17, 1983

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 17

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JEAN LORETTO, & c.

Appellant,

v. 8300/76

TELEPROMPTER MANHATTAN CATV CORP., et al.,

Respondents.

----------x

The appelant in the above entitled appeal appeared by Gruen, Muskin & Thau, Esqs.;

The respondent(s) appeared by Shea & Gould, Esqs.; Frederick A.O. Schwarz, Jr., Corporation Counsel; and Robert Abrams, Attorney General also appeared.

The Court, after due deliberation, orders and adjudges that upon reargu-

ment, following remand by the Supreme Court of the United States, order modified, with costs to appellant, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Meyer. Chief Judge Cooke and Judgees Jasen, Jones, Wachtler, Fuchsberg and Simons concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contans a correct record of the proceedings in this appeal in the Court of Appeals and

that the papers rquired to be filed are attached.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
February 17, 1983.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, 60 Centre Street, New York, New York on the 11th day of July 1983

PRESENT: HON. ALVIN F. KLEIN, JUSTICE.

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

-against-

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Defendants-Respondents.

: Index No. 8300/76

: ORDER AND JUDGMENT ON REMITTITUR

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Plaintiff-appellant herein, having appealed to the Court of Appeals of the State of New York, from an Order of the Appellate Division, First Department, entered in the office of the Clerk of

said Court on the 11th day of December, 1979, which Order unanimously affirmed, without opinion, a judgment of the Supreme Court, New York County (Grossman, J.) made on April 2, 1979 and entered on April 11, 1979, which granted summary judgment to the defendants and dismissed the complaint, and the Court of Appeals, having heard said appeal and ordered and adjudged that the Order so appealed from be affirmed, with costs, and the Remittitur of the Court of Appeals having been duly filed in the office of the Clerk of the County of New York; and this Court having made its Order For Judgment on remittitur from the Court of Appeals on May 19, 1981;

AND plaintiff having appealed to the United States Supreme Court from the order and judgment of the Court of Appeals dated May 7, 1981, and the Supreme

Court having noted probable jurisdiction on October 19, 1981, and said appeal having been heard by the United States Supreme Court, and the United States Supreme Court having rendered a decision and order dated June 30, 1982, reversing the judgment of the Court of Appeals and remanding the case;

AND the Court of Appeals having heard the case on remand, and the Court of Appeals having rendered a decision and order dated February 17, 1983, that the order and judgment of the Supreme Court, New York County (Grossman, J.) made on April 2, 1979 and entered on April 11, 1979 be modified and the case remitted to Supreme Court, New York County, in accordance with its decision and, as modified, that such order and judgment be affirmed, and said order of the Court of Appeals dated February 17,

1983 having been duly filed in the office of the Clerk of the County of New York on March 8, 1983;

AND plaintiff having moved for reargument before the Court of Appeals, and said motion for reargument having been denied by order of the Court of Appeals dated April 28, 1983;

NOW, on motion of Shea & Gould, attorneys for Teleprompter Manhattan CATV Corporation and Teleprompter Corporation (the "Teleprompter Defendants"), it is hereby

ORDERED and ADJUDGED, that the Order and Judgment of this Court made on April 2, 1979 and entered on April 11, 1979 in the office of the Clerk of the County of New York is modified as follows:

(a) It is hereby declared that section 828 of the Executive Law represents a reasonable and, therefore, justifiable

exercise of the police power of the State, both with respect to cable TV components placed directly on premises serviced by the Teleprompter Defendants and premises on which equipment is placed to service another building, subject to the fixation of compensation to the owner of such premises by the New York State Commission on Cable Television (the "Commission") upon application to it;

(b) Regulation 598.3 of the Commission (9 NYCRR 598.3) is declared invalid; and

(c) jurisdiction is retained for the purpose of reviewing whether the compensation fixed by the Commission constitutes just compensation within the meaning of the Constitution, and to permit plaintiff, if she be so advised, to proceed with her action in trespass

for the period between February 28, 1972 and January 1, 1973; and to re-present by either party any appropriate issue, including any previously dismissed as moot, and it is further

ORDERED and ADJUDGED that, except as modified hereinabove, the order and judgement made herein on April 2, 1979 and entered on April 11, 1979 in the office of the Clerk of the County of New York remains in full force and effect.

E N T E R:

/s/ AFK
J.S.C.

1-10 Mo. No. 160

Jean Loretto, &c.,

Appellant,

vs.

Group W Cable, Inc., et. al.,

Respondents,

Attorney General of the State of New York,

Intervenor-Respondent.

Motion for leave to appeal denied.

Chief Judge Wachtler took no part.

DECISION COURT OF APPEALS MAR 24 1988

Excerpt from Plaintiff's Motion to N.Y. Court of Appeals for Leave to Appeal

QUESTIONS PRESENTED FOR REVIEW

The following questions, without limitation, will be presented by Plaintiff for review:

1. Is Plaintiff entitled to attorneys' fees as the "prevailing party" in a class action under the Federal Civil Rights Act of 1964 (42 U.S.C. § 1988) and CPLR § 909 where the United States Supreme Court has determined in Plaintiff's favor (reversing this Court) that Defendant Group W's installation of cable television transmission equipment on private property under ostensible authority of Executive Law § 828 constitutes a taking requiring just compensation to be paid, although this Court had

previously ruled that property owners are entitled to no compensation whatsoever other than what the State Commission on Cable Television may grant on a discretionary basis; where this Court then directed the Commission to revise its procedures accordingly and the Commission did so; and where Plaintiff succeeded in eliminating the Commission's former 60-day statute of limitations which had effectively cut off the vast bulk of potential claims, including Plaintiff's?

2. If Plaintiff is the "prevailing party", may the application for attorneys' fees nevertheless be denied as "premature" merely because a proceeding would have to be maintained in an administrative agency to determine Plaintiff's individual damages?

* * *